

# SUPREME COURT OF THE UNITED STATES

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144.

*JOHN T. POWERS,*

*Plaintiff in Error,*

*vs.*

*THE CHESAPEAKE & OHIO RAILWAY COMPANY,*  
*Defendant in Error.*

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The questions involved in these proceedings in error are new, but not difficult.

The principal question may be thus stated: Can a plaintiff, in a suit brought in a state court, by *fraudulent conduct* or device, prevent the filing, in proper time, of a petition, in the state court, for the removal of the cause to the federal court, and there be heard to object to the removal of the cause upon the sole ground that the petition for removal was not filed in proper time in the state court?

The Circuit Court, in its opinion overruling the motion to remand this case to the state court, clearly states the question involved in this case:

"A plaintiff has a joint and several cause of action against a citizen of another state and citizens of his own state; he joins them in a single action in the state court for the sole purpose of preventing a removal by the non-resident to the federal court. After the statutory time for removal has passed, and the joinder of

the resident defendants has, as he thinks, effected his purpose, the plaintiff discontinues the case as to all but the non-resident defendant. Does this conduct estop the plaintiff from making the objection that the petition for removal, filed immediately after the discontinuance, is too late?" (Record, page 46).

We submit herewith a statement of facts, which is somewhat fuller than the statement submitted by plaintiff in error, and which, we think, will give the Court a better understanding of the facts, the plaintiff having omitted all reference to facts prior to September 7, 1893, although said facts appear in the Record.

#### **STATEMENT OF CASE.**

On the 14th day of April, 1893, John T. Powers, the plaintiff in error, brought a suit in the Kenton Circuit Court of Kentucky against the defendant in error and one David Evans, an employe of the defendant in error, to recover the sum of \$25,000 for injuries alleged to have been sustained by him through the negligence of the defendants. The defendant in error was a corporation organized under the laws of Virginia and West Virginia, and the defendant Evans was a citizen of Virginia. The defendant in error, in proper time, filed its petition in the state court for the removal of the case to the United States Circuit Court for the District of Kentucky, upon the ground of diverse citizenship of parties plaintiff and defendant. The petition was accepted and the bond approved by the state court. In due time the defendant in error filed the transcript in the federal court.

The plaintiff in the case filed in the United States Court an answer to the petition for removal, controverting the allegations of diverse citizenship, and moved to remand the case to the state court. The motion to remand was

overruled. *Thereupon the plaintiff dismissed his suit.* (See Record, pages 32 to 44).

After the dismissal by the plaintiff of his suit in the United States Court, the plaintiff brought a second suit on the same cause of action in the Kenton Circuit Court of Kentucky, in which he joined as defendants the same parties he had sued in his first suit, and also W. D. Boyer and Edward Hickey, alleging in his petition that Boyer was a conductor, Evans an engineer and Hickey a switchman, in the employ of the defendant corporation; that the plaintiff was a switchman in the employ of the defendant corporation; and that while working as a switchman on the road of the defendant corporation the defendants, with gross and wanton negligence, ran a car upon the plaintiff, crushing his arm, so as to require amputation, to plaintiff's damage in the sum of \$25,000.

The defendant corporation, *before its answer was due*, filed in the state court its petition for the removal of the cause to the United States Court, upon the ground of diverse citizenship of parties plaintiff and defendant, the existence of a separable controversy, and upon the ground that Boyer and Hickey had been made parties defendant, solely for the fraudulent purpose of preventing the removal of the cause to the federal court. The state court accepted the petition and approved the bond for removal, and in due time the transcript was filed in the United States Circuit Court for the District of Kentucky. The plaintiff filed in the federal court an answer, controverting the allegations of diverse citizenship, contained in the petition for removal, and denying that Boyer and Hickey had been fraudulently joined as defendants to defeat the removal of the cause to the federal court, and moved to remand the case to the state court. Upon trial of these issues the Court sustained the motion to remand the case to the state court, and the case was so remanded on January 10th, 1894. (Rec., p. 7).

After the case was remanded to the state court, to-wit, on February 6th, 1894, the defendant corporation filed in the state court, its answer, controverting all the allegations of negligence, contained in plaintiff's petition, and pleaded contributory negligence upon the part of the plaintiff, and plea of limitation. (Rec., pages 15 and 16). On the 16th day of October, 1894, the plaintiff replied to the pleas of contributory negligence and limitation, controverting same. (Rec., p. 19).

The cause was now at issue on October 16th, 1894, and *on the same day was called for trial.* On this day, *October 16, 1894,* the plaintiff, upon his own motion, dismissed the case as to all the defendants in the case, except the Chesapeake & Ohio Railway Company.

Upon the dismissal of its co-defendants, the Chesapeake & Ohio Railway Company immediately (on October 16th, 1894,) filed another petition and bond for the removal of the case to the United States Circuit Court for the District of Kentucky, alleging the jurisdictional amount, the diverse citizenship of the parties plaintiff and defendant; that the cause was wholly between citizens of different states; that when the suit was originally brought the plaintiff had fraudulently and improperly joined as parties defendant citizens resident of the same state in which plaintiff resided, for the sole purpose of defeating the petitioner's right to remove the cause to the federal court; that because of such joinder the case was remanded to the state court; that after the case had been remanded and issues joined in the state court, the plaintiff had, upon his own motion, dismissed the suit as to all the defendants, except the petitioner; that the case on that date, October 16th, 1894, was for the first time a suit pending against the Chesapeake & Ohio Railway Company, alone, and praying the Court to order the removal, approve the bond, and proceed no further with the case. (Rec., pages 17, 18, 19).

The state court refused to approve the bond, but "not for insufficiency thereof." A jury was impaneled in the state court, and the case went to trial, resulting in a verdict against the defendant in the sum of \$10,000. (Rec., p. 25).

On December 3d, 1894, the first day of the December Term, 1894, of the Circuit Court of the United States, the said term being the first term of said court after the filing in the state court of the petition for removal of the cause to the United States Circuit Court, the Chesapeake & Ohio Railway Company filed in said Circuit Court of the United States, a transcript of the record in the state court. (Rec., page 7).

On the 8th day of December, 1894, the plaintiff moved the Court to remand the case to the state court.

The grounds of the motion to remand were:

*First.* That the case was not removable from the state to the federal court.

*Second.* That the petition and bond were not filed within the time fixed by law for the filing thereof.

*Third.* That the question raised by the petition for the removal had theretofore been adjudicated by the United States Circuit Court, and such adjudication was relied on in bar to the last removal proceeding. (Rec., page 27).

The plaintiff filed answers to the petition for removal, but did not controvert the allegations of jurisdictional amount, and diverse citizenship of parties plaintiff and defendant. (Rec., pages 28, 31). The only issue made was as to fraudulent conduct of plaintiff in state court, which prevented an earlier filing of the petition for removal in the state court. Two affidavits were filed (Rec., pages 26 and 27), and the transcript of the record in the first removal suit. (Rec., pages 32 to 43 inclusive). Upon the issue thus joined, the motion to remand was submitted, on the pleadings and evidence.

On January 7th, 1895, the Court overruled the motion

to remand, upon the ground that the plaintiff had, by fraudulent devices and conduct in the state court, prevented the defendant from filing his petition for the removal of the cause to the United States Circuit Court prior to the day on which it was filed, and that, therefore, the plaintiff was estopped from objecting to the time of its filing. (See opinion of Court, Rec., pages 43 to 54). The Court then approved the bond for removal which had been tendered by the defendant in the state court.

On December 9th, 1895, the plaintiff filed in the case a plea in abatement to the defendant's right to maintain the case in the United States Circuit Court.

The Chesapeake & Ohio Railway Company demurred to plaintiff's plea in abatement, which demurrer was sustained by the Court, the plaintiff excepting. The Court overruled the motion to defer proceedings. (Rec., pages 56 and 57).

On December 10th, 1895, the plaintiff renewed his motion to remand the case to the state court, which motion the Court overruled, the plaintiff excepting.

On February 14th, 1896, the case was called for trial in the Circuit Court of the United States for the District of Kentucky. The plaintiff still insisting upon his objection to the jurisdiction of the court, declined to recognize such jurisdiction or to prosecute his suit in said court, or to proceed further with said cause in said court, and the Court being of opinion that the plaintiff's petition did not state a good cause of action, adjudged that the action be dismissed at plaintiff's costs, to which ruling plaintiff excepted, and filed his petition for a writ of error to this court upon the ground alone that the case was not properly removed from the state court to the United States Circuit Court for the District of Kentucky, and that the United States Circuit Court for the District of Kentucky was without jurisdiction over said cause.

**ARGUMENT.**

A motion was filed by the defendant in error to dismiss the writ of error herein, upon the ground that no question of the jurisdiction of the Circuit Court of the United States is involved. A brief has been filed in support of that motion, so no further discussion of the motion will be attempted here.

In event that the Court should overrule the motion of the defendant in error to dismiss the writ of error, or in event the Court should desire an argument upon the whole cause, this brief is submitted, upon the question of the correctness of the rulings of the Circuit Court, in refusing to remand the case to the state court.

We submit it was the apparent purpose of the plaintiff in error to defeat, if possible, the right of the defendant in error to have the cause tried in the federal court. The dismissal of the first suit, after the Circuit Court had found that that case had been properly removed, evinces a determination upon the part of the plaintiff in error to prevent the trial of the case in the federal court. We do not question his right to have a dismissal of his case, if he so desired it, but we submit that the fact that he did dismiss is evidence of his purpose to deprive the defendant in error of a trial in the federal court.

*Arrowsmith v. Nashville & Decatur R. R., 57 Fed. Rep., 165.*

In the first suit only two defendants were before the Court—the defendant in error and David Evans. The record in the suit shows that the plaintiff thought that Evans was a citizen of Kentucky, as his answer, filed in the federal court, controverts the allegation of the petition for removal that Evans was a citizen of Virginia. Clearly, the plaintiff thought that that, by making Evans a party defendant, he had prevented the defendant from removing the case.

Upon the discovery of the mistake, he has made as to the citizenship of Evans, to avoid trial in the federal court, he dismisses his suit. Another suit was brought in the state court, on the same cause of action. Parties, who *were not* deemed necessary parties defendant in the first suit, were made parties defendant in the second suit. Both of these new parties defendant were citizens of Kentucky, the same state of which the plaintiff is a citizen. This making of new parties was clearly for the purpose of carrying into effect the plaintiff's object, to deprive the defendant corporation of its right of removal. A petition for removal was filed in the second suit, upon the grounds of diverse citizenship of parties plaintiff, and defendant corporation, and the existence of a separable controversy as to them, and upon the further grounds that the defendants, who were citizens of Kentucky, had been improperly and fraudulently joined as defendants, for the purpose of defeating the defendant corporation's right to remove the case to the United States Court. Upon a motion to remand, made in the Circuit Court, that Court held :

*First.* That there is no separable controversy in the case.

*Second.* That the plaintiff in the case had the right to join other defendants, if they were joined in good faith, even though the purpose of their joinder was to defeat the right of removal, and that there was no evidence to show a joinder of defendants for a fraudulent, or wrongful purpose. So the motion to remand was granted.

The case was remanded to the state court. The defendant filed its answer. The issues were joined in that court. The case was called for trial. The time when the defendant was required by the law of Kentucky to answer had long passed. The plaintiff evidently thought that as it was now too late to file a petition for the removal of the case to the federal court, the presence of other defendants in

the case was no longer necessary ; the sole purpose of making them parties defendant was accomplished. The jurisdiction of the federal court was defeated, and so, upon the day of trial, the plaintiff, on his own motion, dismissed the cause as to all of the defendants, except the Chesapeake & Ohio Railway Company.

At this moment, for the first time, by the action, by the election of the plaintiff, the case became a controversy wholly between citizens of different states. The act of the plaintiff making the controversy one wholly between himself and the Chesapeake & Ohio Railway Company, made the case for the first time a removable case.

The right of removal was immediately exercised ; a petition and bond for removal was immediately filed, the removal was refused, a transcript was filed in the United States Court, and a motion to remand was made.

In passing upon this motion to remand, the Court, after reviewing the decision granting the motion to remand on the first removal of the case, and affirming its opinion then rendered, says :

" But the motive of the plaintiff in joining such defendants does become material, if he subsequently dismisses them, and makes the case before the final trial, one which would have been removable had it not been thus originally brought. If the Court can gather from the circumstances that the joinder and subsequent dismissal of the other defendants was a new device to defeat a removal by the non-resident within the statutory time, and with no purpose of ever pushing the case to judgment against the others we are very clear that the plaintiff ought not to be allowed to take advantage of a delay in removal which his own fraud has brought about, and that he must be estopped to use that delay as an objection." \* \* \* \*

"It is often within the power of a plaintiff to deprive a defendant of the right to go into the federal court by questionable means, which a want of comprehensiveness in the statute prevents the Court from defeating, but, as Mr. Justice Miller said in the Circuit, in the case of Arapahoe County v. Kansas Pacific Ry. Co. et al, in speaking of the constitutional right of persons, with requisite citizenship to resort to the federal courts and the necessity of preserving it, 'we must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right.'

"The facts of the present case seem to us clearly to show that there was a device to deprive the Chesapeake & Ohio Railway Company of its constitutional and statutory right to come into this Court, and we find no difficulty in defeating the device on principles well supported by decided cases." (See Opinion Circuit Court, Rec., 43 to 54).

The evidence relating to the conduct of the plaintiff requires no elaboration. It can not be elaborated. It speaks for itself. It shows the exercise of the highest order of ingenuity in devising and carrying into effect an unlawful and fraudulent device to prevent the defendant in error from exercising its constitutional right to remove the case against it to the federal court for trial. There are no precedents clearly in point upon this case. Most probably, such proceedings, to prevent a removal, were never before attempted. It requires courage to father such a scheme.

It would be idle to attempt an improvement upon the very clear summing up of facts, and clear exposition of the law contained in the opinion of the Circuit Court. The question presents itself to this Court to be solved, by the acts of the plaintiff below. His acts must speak for them-

selves. His intentions and motives must be gathered from his acts.

It must, we submit, be clear to the Court that his whole proceedings in the state court was an ingenious unlawful device to prevent the removal of the cause to the federal court.

The defendants subsequently dismissed were not originally made parties defendant in good faith. The making them parties defendant was in bad faith for a fixed object, solely for the purpose of preventing a removal of the case to the federal court. Their subsequent dismissal shows this.

Can it be possible that a litigant can be deprived of a constitutional right by such scheming and practice? The question presents itself fairly. An earlier filing of the petition was prevented by the conduct of the plaintiff. Shall the plaintiff be permitted to plead and rely upon his fraudulent conduct to secure an advantage to himself?

Suppose a plaintiff, in a removable case, should by bodily violence prevent a defendant from filing in proper time, his petition for a removal of his suit to the federal court, would he be for a moment permitted to object to the removal upon the ground that the petition was not filed in time?

This Court has held in many cases, that objections to the time of filing of a petition for a removal to the United States Court out of time may be waived.

Ayers v. Watson, 113 U. S., 594.

Northern Pacific R. R. v. Austin, 135 U. S., 315.

Martin's Adm'r v. Balt. & O. R. R. Co., 151 U. S., 673.

It follows, we submit, that if objection to time may be waived by agreement, it may be waived by the conduct of parties. Indeed, in the cases of Ayers v. Watson and Mar-

tin's Adm'r. v. the Balt. & O. R. R. Co., above cited, the waiver of objection as to time of filing the petition, was altogether by the conduct of the parties in those cases. It is a well settled principle that the doctrine of estoppel may arise from the conduct of parties, and on no firmer foundation does the question of estoppel rest than upon the conduct of parties in waiving their rights and privileges. It is upon this principle of estoppel by conduct that the Circuit Court decided this question. In its opinion, the Court says:

“On the whole, therefore, we conclude that the question is fairly before us, whether by the joinder by the plaintiff in the state court of resident defendants, against whom a good cause of action is stated, solely to prevent a removal by a non-resident defendant, and the subsequent dismissal of such resident defendants from the case, leaving the suit against the non-resident alone, estops plaintiff to plead the time of limitation against the removal.” (Rec., p. 47).

We submit that no clearer case can be found for the application of the doctrine of estoppel than in the case under consideration. The national courts have been always vigilant in protecting the rights of litigants who seek their jurisdiction, in seeing that justice is meted out to all, and that unlawful devices to destroy the rights of litigants shall not be permitted.

In the case of Arrowsmith v. Nashville & Decatur R. R. Co., 57 Fed. Rep., 165, Judge Lurton, on a motion to remand, held:

“The right to remove is a constitutional right, and while this Court should never seek to trench upon the jurisdiction of state courts, yet on the other hand it can not submit to see its jurisdiction defeated by so apparent a device as the joinder of a local defendant for

the purpose of depriving the only real defendant of the right of removal."

Mr. Justice Miller says, in the case of Arapahoe County v. Kansas Pac. Ry. Co., 4 Dillon, 277:

"It would be a very dangerous doctrine, one utterly destructive of the rights which a man has to go into a federal court, on account of his citizenship, if a plaintiff in a case, instituting his suit, can, without right, reason or just cause, and with the express declaration that he asks no relief from them, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in federal courts.

"We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

In the cases last cited the plaintiff's pleadings showed that defendants had been made parties to the suit, merely for the purpose of defeating a removal of the cause to the federal court.

The decision of Mr. Justice Miller in the case of Arapahoe County v. R. Co. is cited approvingly by this Court in the case of Walden v. Skinner, 101 U. S., 577.

It has also been held in cases where citizen defendants have been joined with non-citizen defendants, thus making a case which would otherwise have been removable, a non-removable case; that *even though the petition may state a good, joint cause of action against all of the defendants*, yet the non-citizen defendant may file his petition for a removal, upon the ground that his co-defendants are not real defendants, but were joined for the *fraudulent purpose* of defeating his right of removal. Upon the filing of the transcript in the federal court, that court will hear and determine the question of the fraudulent joinder of defendants, and, if the

allegations of the petition for removal are sustained, will refuse to remand.

This was decided by the United States Circuit Court for the Southern District of Iowa in the case of Dow v. Bradstreet, 46 Fed. Rep., 824. In deciding this case Judge Shiras says:

"A fraud of this nature, if successful, deprives the citizen of the right conferred upon him by the Constitution and laws of the United States, and certainly it must be that it can not be perpetrated without a remedy existing for its correction. Unless this be so, then it is possible to defeat in every instance the right of removal, when the same depends upon the citizenship of adverse parties, by the easy device of joining as a party one who has no interest in the case, but who is a citizen of the same state as the plaintiff."

The correctness of this holding has been recognized, if not expressly adjudicated, by this Court in

Plymouth Mining Co. vs Amador Canal Co., 118 U. S., 264.

Railroad v. Wangelin, 132 U. S., 599.

See also Durkee v. Illinois Central R. R., 81 Fed. Rep., 1.

The above cases are cited to show that the national court will inquire into conduct of the plaintiff, in bringing his action in the state court, in order to ascertain his intention, and will be swift to defeat devices to deprive citizens of their right to have cases tried in tribunals which both the Constitution and laws of the United States open to them. In this case the petition for removal alleged the fraudulent joinder of parties defendant, for the purpose of defeating the right of removal. This allegation was controverted by answer filed in the federal court. Upon the

issue thus joined the Court heard evidence and determined that question in favor of the petitioner for removal, and as a result of that decision held that the plaintiff below was estopped by his fraudulent conduct from objecting that the petition for removal was not filed in proper time.

The issue of fraud was clear cut. Its determination was the decision of a question of fact, submitted to the Court by the parties. The Court, with the parties before it, with its knowledge of all the circumstances of the case, decided the question. We submit that the decision thus made is correct; it is sustained both by the law and the facts. We further submit that the judgment rendered by the Circuit Court upon such a hearing is not reviewable by this Court.

In considering the question of the application of estoppel by conduct in removal cases, this Court, in Northern Pacific Railway v. Austin, 135 U. S., while not expressly deciding the question, at least gives a very strong intimation of the rule which should govern such a case.

A suit has been brought to recover \$475, making a controversy involving less than \$500, the minimum amount that at that time authorized a removal. After the trial began, the Court permitted, over the objection of the defendant, an amendment to be filed, increasing the amount claimed to \$1,000. A verdict and judgment was rendered for \$750. No petition for removal was filed or offered in the state court, after the filing of the amendment, increasing the amount. Error was prosecuted to this Court, the error complained of being the filing of an amended petition, increasing the amount claimed. This Court dismissed the proceedings, holding, that as no petition for removal had been filed, this Court had no jurisdiction to review the ruling of the state court, permitting the amendment to be filed. After arriving at this conclusion, Chief Justice ~~Mc~~  
~~he~~ adds :

"If the application had been made the question then would have arisen whether it came too late under the circumstances. The defendant was not entitled to remove the suit as originally brought before, or at the time at which said cause could be first tried, and before the trial thereof. But the objection to the removal depending upon the absence of jurisdictional amount was obviated by the amendment. As the time within which the removal must be applied for is not jurisdictional, but modal and formal. *Ayres v. Watson*, 113 U. S., 594, 598. It may, though obligatory, to a certain extent be waived; and as where a removal is effected, the party who obtains it is estopped upon the question of time, so, if the conduct of the plaintiff, in a given case, was merely a device to prevent a removal, it might be that the objection as to the time could not be raised by him.

"If, on the other hand, the motive of the plaintiff can not be inquired into, or, if admitted, would not affect the result, as in most cases, of *Thompson v. Butler*, 95 U. S., 694; *Postal Telegraph Co. v. O'Connor*, 128 U. S., 394, the defendant would simply suffer for want of comprehensiveness in the statute. The amendment here was held to have been properly allowed, and we have no power or disposition to interfere with the action of the Court in regard to it.

"The only importance it has is in its bearing upon the charge of bad faith in respect to the right of removal, and that question can not properly arise in the absence of an application for removal."

It must be conceded that the language of the Court in the above cited case is not an adjudication of the question involved in this case, but it must be held to be a very strong statement of the principles of law of estoppel which should control such questions.

## II.

The correctness of the rulings of the lower court may be rested upon a broader basis than the question of waiver or estoppel, that is, that the Circuit Court was right in overruling the motion to remand the case to the state court, *because the petition for removal had been as a matter of fact and law filed in the state court in proper time.*

Before the answer was first due in the state court, a petition and bond for a removal of the case to the federal court was filed in the state court. The bond was approved, and in due time a transcript was filed in the United States Circuit Court. That court remanded the case to the state court, upon the ground that it was not a removable case, there being in the case no separable controversy between citizens of different states.

The judgment remanding the case to the state court was a final adjudication, *in this case*, of defendant's right of removal at that time. It follows, therefore, that at the time, when, under the law of Kentucky, the defendant was required to answer plaintiff's petition, the case was not a removable case, and that no petition of removal could at that time have been filed.

The Constitution guarantees the right to citizens of different states to have the controversies between them tried and decided in the federal courts. Congress, in prescribing the mode in which this constitutional privilege shall be exercised, requires that a petition for removal shall be filed in the state court.

"At the time, or any time before the defendant is required by the laws of the state or rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."

By the express enactment of the statute only "the

party that is entitled to remove the suit" can file a petition for removal.

Of course, the case must be a removable case at the time the answer of the defendant is due, or a petition for a removal can not be filed. The law would never require so vain a thing to be done as the filing of a petition for a removal in a case that was not removable. Congress, in fixing the time within which a petition for a removal should be filed, clearly limited the requirements as to filing petitions to cases that were removable when defendant's answer was due, but behind the act of Congress, regulating the manner of removal, is the constitutional right of the citizen to have his case tried in a federal court. While Congress may regulate, it can not take away that right. We submit that it is only in cases where Congress has attempted to regulate, that the rule regulating applies.

A case between citizens of different states may not be, at its inception, a case that is removable under act of Congress, but the same may afterwards become a removable case.

Evans v. Dillingham, 43 Fed. Rep., 177.  
Huskins v. Cincinnati Ry., 37 Fed. Rep., 504.  
Northern Pac. Ry. v. Austin, 135 U. S., 315.

Can it be possible that Congress intended to prohibit the removal of such a case, by a requirement that the petition for removal should be filed before the case became a removable case?

To illustrate, suppose A, a citizen of Kentucky, sues B, a citizen of Ohio, in a state court of Kentucky to recover \$500 for a breach of contract. Summons is served on B and on the day that his answer is due, under the law of Kentucky, he files his answer in the state court, controverting the allegations of the petition. The next day, by an amendment, B increases his demand and prays judgment

for \$10,000. Clearly, when B's answer was due in the state court, the case was not removable. Just as clearly the increasing of the demand to \$10,000 made the case a removable case. By the action of the plaintiff, the jurisdictional facts, of citizenship and amount, make the case a removable case. Can it possibly be claimed that the failure of B to file his petition for removal, when his answer was first due under the law of the state, deprives him of his constitutional right to have the removable case tried in the federal court.

In the case at bar plaintiff, resident of Kentucky, sues four joint tort feasors for \$25,000; one of the defendants is a citizen of a different state from plaintiff. By reason of the joinder of the defendants the case is not removable. In due time the non-resident defendant files his answer. After the answer is filed and answer day has passed, the plaintiff dismisses the case as to all defendants, except the non-resident defendant. By this act of the plaintiff, the case is changed. A non-removable suit has become a suit of which the federal court might have had original jurisdiction. It has become a removable suit. Will the fact that the plaintiff has changed the suit into a removable suit, after the defendant has filed his answer, deprive the defendant of his right to remove the case?

The act of 1887 gives the right of removal where the diverse citizenship exists and the amount in controversy exceeds \$2,000. These facts are jurisdictional. Without them no case is removable. With them every case, where a separable controversy exists, is removable. The subsequent clause relating to the manner of removal is not jurisdictional, but modal or directory. Can it be contended that when the method or mode of removal, which is applicable only to certain class of cases, and is not applicable to the exceptionable cases, can not be followed, that the right of removal is lost?

Would it not be carrying out the better spirit of the law to hold (when case that was not removable, when the answer was due, afterwards became, by the act of the plaintiff, a removable case), that a petition for removal filed as soon as the case becomes removable, is a substantial and effective compliance with the law regulating the filing of petitions for removal.

Any other construction of the law will make the act of Congress a trap, for taking unfair advantage of litigants.

In a case involving the principle contended for, the Circuit Court of the United States, for the Northern District of Texas, through Judge McCormack, says :

"There is no question in my mind, where an amended petition makes a substantially different suit from the original petition, the limitation as to the time within which the petition for removal can be presented should relate to the new pleading. As an illustration of the propriety and necessity of so holding, take a case where a party sues in the state courts alleging the cause of controversy to be of less value or not of greater value than \$2,000, and after the return time and after defendant has answered, the plaintiff files an amended petition, setting up the same cause of action, but claiming damages in a sum exceeding \$2,000, can it be doubted that, if the state of the parties or the cause of action be such as to have given the right to remove, had the amount in controversy been sufficient to give this court jurisdiction, the defendant would not be denied his right to remove, because the time in which he was required to answer the original petition had passed. I am of opinion that the defendant's application for a removal was made in time, and the motion to remand will be refused."

To the same effect is the case of *Huskins v. Cincinnati, New Orleans & Texas Pacific Railway Company*, 37 Fed. Rep., 504.

The principle is recognized in the case of the Northern Pacific Ry. Co. v. Austin, 135 U. S., 315, cited and fully quoted on pages AS-16 of this brief.

If the principle contended for be wrong, then it is possible to defeat, in every instance, the right of removal, when the same depends upon the citizenship of the parties, by the easy devices of bringing suits for amounts less than will authorize a removal, and after answer has been filed, increasing the amount sued for to any sum the plaintiff may desire; or by joining in the suits defendants citizens of the same state with the plaintiff, without the intention of prosecuting the suit as to them, but with the intention of dismissing them from the suit as soon as the defendant, who is not a citizen of the state, has filed his answer.

We respectfully submit that every citizen who is entitled to remove a case from a state to a federal court is entitled to file his petition for removal *after the case has become a removable case*, and that the reasonable construction to be given to the act of Congress is that the petition for removal must be filed, when the defendant is required to *answer a removable case*.

The petition that we contend for is sustained by strong authority. In the case of *Yarde v. Baltimore & Ohio R. R. Co.* (57th Fed. Rep., page 913), a suit was brought in the state court of Indiana to recover against the defendant corporation for personal injuries. The prayer of the petition was, "By reason of the premises the said widow and children have been damaged in the sum of — thousand dollars. Wherefore the plaintiff demands judgment for — thousand dollars." The plaintiff was a citizen of Indiana. The defendant was a corporation under the laws of another state. A petition for removal was filed, upon

the ground that the controversy existed wholly between citizens of different states, and that the amount sued for exceeded \$2,000. The defendant claimed that as the statute of Indiana provided for the recovery of \$10,000 for a wrongful killing, that where the amount in a petition was left blank, the words "ten thousand" should be read into the petition. The state court granted the removal. The transcript was filed in the United States Circuit Court for the District of Indiana. The motion was made to remand upon the ground that the amount in controversy did not exceed \$2,000. The Court held that under the allegation of the petition only \$1,000 could be recovered, and the motion to remand was granted. In the rendition of its opinion the Court says :

" It is urged that the motion to remand should be denied, because it is said that it is apparent that the blank space in the complaint was left unfilled simply as a device to prevent the removal of the cause to the federal court. It is due to the attorneys for the plaintiff to say that they explicitly disclaim any such motive. It is not material to the determination of the motion whether the omission was the result of oversight, or arose from a desire to defeat the right of removal. The right of removal is secured by the Constitution and laws of the United States, whenever the requisite diversity of citizenship exists, and matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000. This right can not be defeated by any artifice, evasion or omission. *If at any time during the progress of an action in a state court by amendment or otherwise a cause of action not before removable is changed or converted into one which is properly removable, the defendant, whether an alien or citizen of another state than that of which the plaintiff is a citizen,*

*has the right to file his petition and bond and secure a removal of the cause into the proper federal court.\* It has often been held that if the defendant has a right to the removal, he can not be deprived of it by the allowance by the state court of an amendment reducing the sum claimed after the right of removal is complete. Kanouse v. Martin, 15 How., 198. The converse of this proposition must be true, that a defendant not entitled to removal, who becomes entitled to it by reason of an amendment of the complaint allowed by the state court, may remove the cause, although the time has elapsed within which his removal of the cause ought to have been asked for, if he promptly files his petition and bond after such amendment has been made. Huskins v. Railway Co., 37 Fed. Rep., 504; Evans v. Dillingham, 43 Fed. Rep., 177, 180."*

In the case of Cookerly v. the Great Northern Ry. Co. et al, reported in 70th Fed. Rep., page 277, the plaintiff brought suit against three defendants to recover for the killing of his decedent, through the alleged negligence of the defendants. A suit was brought against the Great Northern Railway Company, the firm of Shepard & Seims and the firm of McKenzie & Glenn. Summons was not served upon Shepard & Seims, who were non-residents of the state. The other defendants joined issue by denying their liability. McKenzie & Glenn were citizens of the state of Washington and the Great Northern Railway a corporation incorporated under the laws of Minnesota. The case was brought to trial in the state court, and after plaintiff's evidence had been introduced a non-suit was granted as to McKenzie & Glenn. The plaintiff then asked leave to file an amended petition against all the defendants. The Court refused to permit the amended petition to be filed as

\* Italics ours.

against McKenzie & Glenn, but permitted it to be filed as against the Great Northern Railway Company. The time for answer had long since passed and the case had gone to trial. Immediately upon the filing of the amended complaint against the Great Northern Railway, that company filed its petition for the removal of the case to the United States Court, upon the ground that the controversy for the first time existed between themselves and the plaintiff; that the amount in dispute exceeded \$2,000, and alleging diverse citizenship between plaintiff and themselves. An order was made granting said petition of removal, and the transcript was filed in the United States Court. A motion was made in the United States Court to remand the case to the state court, upon the ground that the petition for removal was filed too late. That Court held that the suit as originally brought was not a removable suit by the railway company; that the discontinuance of the case as to McKenzie & Glenn made the case for the first time a removable case, which entitled the remaining defendants to exercise the right of removal, and based its decision distinctly upon the ground that the joinder of the other defendants had prevented the railway company from removing the case before that time.

The Court says :

"The Great Northern Railway Company having been prevented from exercising its right of removal at an earlier stage of the proceedings by the disability imposed upon it by the plaintiffs in joining McKenzie & Glenn as co-defendants, I hold that this petition for removal was in time, it being in fact presented to the Superior Court before the expiration of the time limited for answering the amended complaint."

Cookerly v. Great Northern Ry. Co., 70th Fed. Rep., 277.

See, also, Mattoon v. Reynolds, 62 Fed. Rep., 417.

In the case of Yulee v. Vose, 99 U. S., 539, the same principle was decided. The case came to this court in error to the Court of Appeals of the State of New York. Yulee, a citizen of Florida, had been sued with other defendants, by Vose, a citizen of New York, in the courts of the state of New York, and the defendants with whom he had been joined were then citizens of the state of New York. If there had been no other defendants but Yulee, he could have removed the case to the Circuit Court of the United States. His joinder with the other defendants, however, prevented the removal; as the case then stood, it was impossible for him to procure a removal when the suit was brought. When the case was tried, it was held that there could be no relief as against any of the defendants, except Yulee.

Thereupon the complaint was dismissed as to all of the defendants, except Yulee. Yulee then filed his petition and bond for removal to the United States Court, upon the ground of diverse citizenship, which was refused by the state court, and *the trial proceeded*, resulting in a verdict by order of the Court against Yulee for \$168,589.30, for which judgment was rendered. Exceptions to the ruling were duly taken. Upon this state of the record, the case was taken by proper proceedings to the Court of Appeals of New York, where the judgment was affirmed, upon the ground that the suit was not removable, under the act of 1866, when the petition for removal was filed. The ruling of the Court of Appeals came to this Court for review on error. This Court, after reviewing the facts, held that the petition for removal was filed in time, and that the case was removable. The Court says:

"Here the party, otherwise entitled to remove, is embarrassed by the presence of those whom he can not control. In view of this the time of making his election

is extended until he is brought to trial, and it is not in conflict with the Pechner case to say that he may avail himself of his relief from the obligations of his defendants with the other defendants whenever that occurs, if before trial or final hearing as to him.

"When application for the removal was made, it appeared upon the face of the record, that Yulee, a citizen of Florida, had been sued, with other defendants, by Vose, a citizen of New York, and part of the other defendants, with whom he had been joined, were citizens of the state of New York. It also appeared that the controversy, so far as it concerned him, not only could be, but actually had been, by judicial determination, separated from the other defendants. This, as we think, gave Yulee the right to transfer his part of the suit to the Circuit Court, and required the state court to proceed no further. Inasmuch as the Court of Appeals has sustained the judgment, refusing to permit the transfer to be made, the judgment of the Court of Appeals is reversed, and the cause is remanded for such further action, in accordance with this opinion, as may be necessary."

*Yulee v. Vose, 99th U. S., 539.*

It is true that the case of *Yulee v. Vose* was brought under the act that permitted a petition for removal to be filed at any time before the trial of the case, but the trial had actually taken place, so as to determine that certain parties to the suit were not liable, and although the issues had been made up by Yulee, and trial as to him had been commenced; yet upon the change of the character of the suit, his right to file a petition for removal immediately vested in him. The case, we submit, is clearly in point with the case at bar. In this case, the suit, as originally filed, did not present a removable case, nor did

the case become removable until, by the action of the plaintiff, the co-defendants of the Chesapeake & Ohio Railway Company were dismissed. Then, for the first time, the right of the Chesapeake & Ohio Ry. Co. to remove the case became an existing right ; then, and not until then, could it elect as to whether or not it would remove or try in the state court. We contend, that under the decisions cited, the right of removal became vested, when its co-defendants were dismissed, and that the petition for removal filed immediately upon the accruing of that right carried with it the right of removal.

### III.

Since the preparation of the foregoing brief, we have been handed the brief of the plaintiff in error herein.

Our learned adversary has undertaken to discuss the question of the *correctness of the finding of facts* of the Circuit Court, upon which the Circuit Court based its judgment, refusing to remand. As we said, in our brief to dismiss the proceedings in error herein, the decision of the Circuit Court, upon these questions of fact, is not reviewable by this Court. If there was error in the decision, it is reviewable only by the Circuit Court of Appeals, upon a bill of exceptions and proceedings in error to that Court.

We submit, however, that the Circuit Court was right in the conclusions of facts reached by it. It is not our purpose to review this evidence at length. We cite the Court to the first proceeding of removal herein, and the dismissal of the plaintiff's case, after the Court had refused to remand the case : to the action of the plaintiff in the state court in making parties defendant against whom he never intended to prosecute his case, who were, *presumptively, financially irresponsible* ; the dismissal of these parties after it was thought that the right of removal had been lost ; to the affidavits of

Boyer and Evans that were submitted to the Court. This evidence was all considered by the Court, with the parties before the Court, upon the issue joined as to the fraudulent conduct of the plaintiff. Upon an issue thus made, we do not think this Court will hold that the Circuit Court committed error in holding that the conduct of the plaintiff in the state court evidenced a fraudulent device to prevent the removal of the case to the Circuit Court of the United States.

We submit, also, that this case is not controlled by the case of Kansas City, etc., Railroad v. Daugherty, 138 U. S., 298. The cases present distinct questions. In the Daugherty case, under the allegations of the petition filed for removal, the case was removable at the time that the defendant was required to plead in the state court. In the case at bar, under the decisions of the Circuit Court, the case was not a removable case, when the defendant was required to plead in the state court. In the Daugherty case, after the defendant's co-defendants had been dismissed from the case, the defendant made no effort to remove the case upon the ground that then, for the first time, the case had become a removable case. In the case at bar, the right of removal was immediately exercised upon the case becoming a controversy wholly between citizens of different states.

A point is also made in the brief of our adversary that the Court erred in permitting an amendment to the petition for removal to be filed in the Circuit Court of the United States.

In the case of Carson v. Dunham, 121 U. S., 421, it was decided that if the jurisdictional facts were shown in the record to justify a removal, an amendment to the petition might be allowed, in the Circuit Court, for the purpose of stating more perfectly the grounds for removal.

See, also, Johnson v. Mfg. Co., 76 Fed. Rep., 616.

In the case at bar, the record submitted to the Circuit Court did show fully all the jurisdictional facts necessary to authorize a removal of the case—first, that the controversy existed wholly between citizens of different states, and secondly, that the amount in dispute exceeded \$2,000. This case is distinguishable from the case of *Crehore v. Ohio & Miss. Ry.*, 131 U. S., 240, cited by plaintiff in error. In the cited case the petition for removal failed to allege the *jurisdictional facts* which permitted a removal, and they did not appear elsewhere in the record. In the case at bar, these facts fully appear in the record. The amended petition for removal offered in the Circuit Court shows that when the other defendants were dismissed in the state court, the attorneys for the Chesapeake & Ohio Railway Company were required *speedily* to prepare their petition for removal; that in the haste of the preparing of this petition they misnamed one of the defendants, and that they failed to *state* that the parties, who *had been dismissed from the case* in the state court, were citizens of the state of Kentucky, and it was to correct this clerical omission that the amended petition was offered. The record, however, clearly showed that both Boyer and Evans were citizens of the state of Kentucky at the time of the filing of the suit (Rec., pp. 14, 15), and that they had been dismissed from the case after the case had been called for trial in the state court. All the jurisdictional facts, therefore, were presented to the Court in the record; the object of the amendment being simply to correct a clerical error, the Court properly, under the rulings of this Court, we submit, permitted the amendment to be filed. The amendment did not set out any jurisdictional facts, and we submit that it was not necessary in the petition for removal, to set up the citizenship of Boyer and Evans and Hickey, because Boyer and Evans and Hickey *at the time of filing the petition for removal were not parties to the suit*; the broad statement that they had

been made defendants for the purpose of preventing the removal of the case to the United States Court, was sufficient to enable that Court to hear testimony in relation to said allegation, and determine the question of fraud, raised by said allegation, without regard to their citizenship at that time.

There is a statement in the brief of the attorneys for the plaintiff in error likely to mislead the Court, to which we deem it important to call attention. The brief states that the defendant in error in the state court filed a demurrer to plaintiff's petition. There is no docket entry showing that such a demurrer was filed. In the *answer* filed by the defendant in error in the state court, there is an allegation that the petition does not state a cause of action against this defendant. That may be taken to be a demurrer, but, if so, it was a demurrer filed simultaneously with the filing of the answer of defendant, before the right of removal to the United States Court had accrued to the defendant. (Rec., p. 15). The filing of the demurrer, therefore, can not be used as an argument against the right of removal any more than was the filing of defendant's answer in the state court. Our contention is that the right of removal accrued for the first time after the filing of the answer.

Counsel for plaintiff in error cite to the Court the decisions of Judges Taft and Lurton, in the case of Warax v. the C., N. O. & T. P. Ry. Co., 72 Fed. Rep., and in the case of Hukill v. the M. & B. S. R. R. Co., 72 Fed. Rep., to the effect that a master and servant are not jointly liable for an injury that is occasioned by the negligence of a servant, and that therefore as there was, under these decisions, no joint liability of the defendant, at the time that their answer was required to be filed in the state court, their petition for removal should have been filed at that time. To this argument we have only to say that the record in this case shows that the defendant in error

did, before it was required under the law of the state of Kentucky to plead, file its petition for the removal of the case to the Circuit Court of the United States; that said case was removed to the Circuit Court of the United States; that the Circuit Court of the United States held that, *in this case, there was a joint liability of the master and servant* for the negligent act of the servant, and that therefore the case was not a removable case. Whatever may be the effect of the decisions in the Warax case and the Hukill cases, we respectfully submit, that in *this case*, the decision of the Circuit Court, upon the question of joint liability is *res adjudicata*, and that it is not the subject of review, as counsel for plaintiff in error suggests. This Court has held; that the granting of an order to remand to the state court, a case that has been removed, is not reviewable, either by this Court or by the Circuit Court of Appeals.

Gurnee v. Patrick, 137 U. S., 141.  
Birdseye v. Shaeffer, 140 U. S., 117.

Therefore, we respectfully submit, that so far as *this case* is concerned there was, at the time that the defendant in error was required to plead in the state court, a case of a joint liability, so adjudged by the Circuit Court of the United States; and that, that decision was binding upon the defendants in this case as to their right of removal, and that the decisions in the Warax case and in the Hukill case can not control the decision of the Circuit Court in this case.

We submit, that, both upon the doctrine of estoppel, which was followed by the Circuit Court, and upon the question that the petition for removal was filed in time, the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

C. B. SIMRALL,  
Attorney for Defendant in Error.